No. 89-1421

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARVIN POWELL, et al.,

Petitioners,

—v.—

NATIONAL FOOTBALL LEAGUE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

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Now that the United States has joined New York, Arizona, Hawaii, Louisiana, Michigan, Mississippi, Texas, Utah and Wyoming in urging the Court to review and overrule the decision below, the respondents have submitted a supplemental brief ("Supp.") in one final attempt to dissuade the Court from granting certiorari. While we hesitate to burden the Court with further submissions, petitioners feel it appropriate to respond briefly below to points raised in respondents' latest brief.

1. Nowhere in their Supplemental Brief do respondents dispute the Solicitor General's conclusion that "the petition presents a question of sufficient importance to the proper functioning of the labor and antitrust laws, and to the maintenance of industrial peace." Brief for the United States as Amicus Curiae ("U.S. Br.") at 19. Rather, respondents simply argue that the ultimate resolution of this important issue be delayed indefinitely. However, as the Solicitor General correctly noted:

> Although the district court's order is interlocutory, *no issues remain to be resolved on remand that bear on when the non-statutory labor exemption terminates. Nor will resolution of those issues develop a record that will aid in resolution of that issue.* Neither respondents (in appealing to the court of appeals), nor petitioners (who seek review in this Court), have identified any further fact finding necessary to determine the proper accommodation of labor and antitrust policies.

(U.S. Br. at 19) (emphasis added).[1]

Nor do respondents dispute the fact, as discussed in the Solicitor General's brief, that the present issue is potentially

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1 Moreover, the context of the present case—with a fully litigated record and findings of impasse both by the NLRB and the district court—is the best imaginable for a resolution of this important issue. If the decision below is permitted to stand, unions in other industries will follow the lead of the NFLPA and abandon union status immediately upon expiration rather than run the risk of bestowing perpetual antitrust immunity on their employer groups.

applicable to any unionized industry with multiemployer bargaining. Their only response is to contend erroneously that "the issues raised by petitioners have not previously surfaced." (Supp. at 2). This argument ignores *Bridgeman* v. *National Basketball Ass'n.*, 675 F. Supp. 960 (D.N.J. 1987), which is directly on point, as well as the numerous other cases from the D.C., Third, Second, Sixth and Ninth Circuits holding that the non-statutory labor exemption is limited to protecting union activity and union-employer agreements. *See* Pet. at 15-16.[2]

Indeed the variety of different formulations on this issue of the endpoint of the non-statutory labor exemption illustrates dramatically the need for this Court's intervention. Petitioners, the district court, the Court of Appeals, the Solicitor General, and the *Bridgeman* court have offered five different endpoints for the labor exemption. Only respondents have never proposed *any* endpoint to their antitrust immunity, resulting in the employer's "Shangri-La" alluded to below by Chief Judge Lay. (Pet. App. B at 28a).[3]

2. The remainder of respondents' arguments go to the merits. Respondents argue that the "impasse" standard espoused by the Solicitor General,[4] and by the district court

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2 Petitioners also continue to believe that the decision below conflicts directly with decisions of this Court construing the labor exemption, as well as decisions requiring exemptions from the antitrust laws to be narrowly construed. *See* Pet. at 13-15, 18-20.

3 Respondents also attempt to dissuade this Court from granting certiorari by alluding to the possibility of a labor settlement with the National Football League Players Association ("NFLPA"). Even if this were in any way relevant to the issue before this Court, the fact is that the NFLPA has been forced by the decision below to renounce its bargaining rights and cease to function as a labor organization. It is undisputed that there has been *no* collective bargaining in the industry for more than a year. There simply is *no* possibility of a collective bargaining agreement in the professional football industry.

4 Respondents mischaracterize the standard advocated by the Solicitor General as "rejecting" impasse as the termination point of the labor exemption. (Supp. at 1-2). The Solicitor General's standard adopts impasse as the "theoretical fulcrum for termination of the implied immunity." *See* U.S. Br. at 17.

below, is not a logical point for expiration of the labor exemption because impasse is "merely a 'temporary deadlock or hiatus in negotiations.' " (Supp. at 3). This objection is specious and ignores the fact that it is the *first* impasse in the negotiations that triggers the endpoint of the non-statutory labor exemption. Under labor law, the employer's obligation to maintain the previous contract's terms ends forever once the first impasse in the negotiations has been reached.[5]

Respondents also argue that impasse does not provide a "workable standard that could be used by employers to guide their conduct and to avoid treble damage liability." (Supp. at 4). Yet the concept of impasse has been developed by the courts and the NLRB for the precise purpose of defining the point at which employers are no longer obligated, under labor law, to adhere to the terms of an expired collective bargaining agreement. The legal standards for determining when collective bargaining negotiations have reached an impasse have been discussed and defined in a myriad of judicial decisions and NLRB proceedings spanning decades.[6]

3. Respondents contend that the Solicitor General "fails to appreciate that employers are not free at impasse to alter terms and conditions of employment in any manner they see fit." (Supp. at 4). Yet the very case cited by respondents confirms that "[i]f the parties were indeed at an impasse, then the employer's statutory duty to maintain the status quo during post contract negotiations . . . would end." *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 543 n.5 (1988) (citing cases).

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5 *See, e.g., Saunders House* v. *NLRB*, 719 F.2d 683, 686-87 (3d Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); *NLRB* v. *Cone Mills Corp.*, 373 F.2d 595, 598-601 (4th Cir. 1967); Morris, *Developing Labor Laws* at p. 236 (2d ed. 1982).

6 Respondents' assertion that impasse is an illusive standard because "unions would be induced to declare negotiations at an impasse" and "[t]hat is precisely what happened in this case" is a highly misleading and grossly distorted version of the record. The facts are that the NFL players struck to eliminate these restraints and the NLRB found that the parties were at impasse in October 1987, long before the district court announced an impasse standard.

Respondents seek to create the impression that they have kept the benefits provided for in the expired agreement in place. (Supp. at 4). This is simply not true. They have unilaterally reduced employee insurance benefits in this hazardous industry, terminated severance pay of $10,000 or more per player, terminated pension contribution obligations of $12.5 million per year, eliminated mandatory salary increases and rescinded union security and dues checkoff provisions. *See*, *e.g.*, Pet. App. E at 59a-61a; Pet. Reply Br. App. A, B at 1a-5a. The Solicitor General aptly characterizes such provisions of the 1982 Collective Bargaining Agreement as the "quid pro quo" for the employees' acceptance of the restraints. As the Solicitor General correctly noted:

> By extending the . . . exemption past the time when the employers may unilaterally diminish or rescind elements of that quid pro . . . the court of appeals . . . gives the party benefitting from [an] anticompetitive restraint . . . the benefit of the . . . exemption without having to pay for it.[7]

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7 Under labor law certain provisions of an expired collective bargaining agreement—including provisions vital to the union's survival and practical ability to bargain, such as those pertaining to union security and dues checkoff—can be rescinded unilaterally by the employers immediately on expiration of the agreement. Here, the respondents did, in fact, unilaterally rescind the previously bargained union security and dues checkoff provisions and terminated $12.5 million in pension obligations immediately on expiration of the agreement. Thus, employers are allowed, even prior to impasse, to rescind provisions which are fundamental to the union's very existence and ability to bargain effectively. In contrast, under the decision below, the players are saddled indefinitely beyond both contract expiration and the point of impasse with their prior acceptance of the anticompetitive restraints deemed vital by the employers. The "asymmetry" of the Court of Appeals' holding is thus even more distorted than the Solicitor General has perceived. While the Solicitor General has correctly urged that the exemption must end immediately upon the employers' implementation of a post-impasse change in the previously-bargained quid pro quo, the exemption must also end immediately upon the employers' *pre*-impasse alteration of the previously-bargained quid pro quo.

(U.S. Br. at 15). Moreover, in March of this year, the respondents unilaterally changed significant terms and conditions of employment by extending the NFL playing season from 16 weeks to 17 weeks in 1990 and 1991, and from 17 weeks to 18 weeks in 1992 and 1993. Respondents have also reduced team rosters. All of the above changes have further deprived NFL players of the quid pro quo contained in the expired collective bargaining agreement.[8]

4. Finally, respondents assert that "it is undisputed that the restraint at issue here does not affect in any way 'competition in business markets'; the restraint's only effect is in a labor market." (Supp. at 5). This argument—that anticompetitive agreements to restrain trade in a market for employee services do not violate the antitrust laws—has never been accepted by a single court anywhere.[9] To the contrary, this Court has uniformly held that the Sherman Act prohibits employers from unreasonably restraining trade in a market for employee or professional services. *See, e.g., Federal Trade Comm'n* v. *Superior Court Trial Lawyers Ass'n.*, ____ U.S. ____, 110 S. Ct. 768 (1990); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Radovich* v. *National Football League*, 352 U.S. 445 (1957); other cases cited in Pet. at 12 n.5, 23 n.17, Pet. Reply Br. at 5 n.7.[10]

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8 Respondents also neglect to mention that the current Plan B system being imposed includes a new "wage scale," to be implemented in 1993. Pet. App. E.

9 *Wood* v. *National Basketball Ass'n.*, 809 F.2d 954 (2d Cir. 1987), cited by respondents, has no application here. In *Wood*, the nonstatutory labor exemption was held applicable because the challenged restraints *were* at that point approved of by the union in an unexpired collective bargaining agreement.

10 Indeed, as pointed out in Pet. Reply Br. at 5, it was precisely because the Sherman Act does apply to such restraints that Congress enacted the statutory labor exemption, exempting only union activities.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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